SUPREME COURT U. S.

FILED

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In the Supreme Court of the United States

October Term, 1968

No. 866

ALLEN N. BRUNWASSER,

Petitioner

v.

ALBERT F. SUAVE, D. R. HALE, RICHARD MORRIS, HARRY HARDING and ARTHUR R. POMPONIO, Individually and t/a KING ARTHUR'S COURT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALLEN N. BRUNWASSER.
Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No.

Alien N. Brunwasser,

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Albert F. Suave, D. R. Hale, Richard Morris, Harry Harding and Arthur R. Pomponio, Individually and t/a King Arthur's Court

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Allen N. Brunwasser prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The District Court for the Eastern District of Virginia filed no opinion. The Order is printed at A. 28.

The opinion of the Court of Appeals (A. 30) is reported at 400 F. 2d 600.

JURISDICTION

The Judgment of the Court of Appeals was dated and entered July 16, 1968. A Petition for Rehearing was mailed July 26, 1968 and denied by the Court en banc September 26, 1968 (A. 3[illegible]). 28 U.S.C. 1254(1) is believed to confer jurisdiction upon the United States Supreme Court to review the judgment in question by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Does the Seventh Amendment to the Constitution of the United States as interpreted by *Simmler v. Conner,* 1963, 372 U.S. 221, 222 and as supplemented by 28 U.S.C. 2072 and Federal Rule of Civil Procedure 38 require a Federal District Court to grant a jury trial upon demand of the party disputing the legal fees claimed by his former counsel?

2. After a diversity suit has been marked settled and discontinued, the judgment satisfied and the money paid and removed, does the Federal Trial Court still retain summary jurisdiction to adjudicate a fee dispute between former attorney and client when the latter is a resident and domiciliary of another State where the money also is located?

3. If a State criminal prosecution plus a Federal jury verdict have never been appealed, does a Federal Court of Appeals have jurisdiction to evaluate those proceedings without argument or notice it would do so and when the conduct of lawyer-appellant in those cases is then adversely commented upon in the official published opinion in the appealed case, does the entire procedure offend the Fifth and Sixth Amendments to the Constitution of the United States and/or require the United States Supreme Court exercise its power of supervision especially if the findings of the Court of Appeals are contrary to what actually occurred and that Court knows it?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF CIVIL PROCEDURE INVOLVED

SEVENTH AMENDMENT

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. §2072

The Supreme Court shall have the power to prescribe, by general rule, the forms of process, writs, pleadings, and motions, and the practice and procedure of the District Courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

FEDERAL RULE OF CIVIL PROCEDURE 38(a)

Right preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Federal Rule of Civil Procedure 38(b)

Demand. Any party may demand a trial by jury at any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Federal Rule of Civil Procedure 67

In an action in which any part of the relief sought is a judgment for a sum of money or for the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of Court, may deposit with the Court all or any part of such sum or thing. * * *"

Alexandria Motion Rule

Motions

Alexandria Division

1. All motions shall be in writing and timely filed in accordance with Rule 6(b); 6(e) and Rule (b)(1) Federal Rules of Civil Procedure.

2. With all motions there shall be filed and served a statement, with appropriate references, of the statutes, rule or authorities, if any, upon which the movant will rely, and then not less than two (2) days before the return day of the motion a like statement of the statutes, rules or authorities, if any, upon which the respondent will rely in opposing the motion.

3. All motions, not made during the course of the trial, shall be filed with the Clerk, and shall automatically be placed on the next pretrial and assignment day calendar, for the fixing of a hearing date, without further Order of the Court. If an earlier hearing date is desired by either party, the movant should serve timely notice upon opposing parties, returnable at ten (10) o'clock a.m. on any day the Court is in session,* at which time the Court will hear the motion or fix a day certain for the hearing.

* Days the Court will be in session may be ascertained from the Clerk's office by telephone.

STATEMENT OF THE CASE

United States Senator Edward V. Long and his subcommittee on administrative practice and procedure were investigating wiretap plus illegal search and seizure activity of the Internal Revenue Service. Petitioner Brunwasser (a member of the Bar of the Commonwealth of Pennsylvania) had relevant information. He was invited to testify and bring his eight year old daughter to observe this operation of government. He accepted.

The earliest morning flight from Pittsburgh would not arrive in time for petitioner to appear when requested. A Shriner's convention occupied every available room in the Capital. So the Committee reserved a room for petitioner and his daughter at an Arlington, Virginia motel (King Arthur's Court) and promised to pay for it either directly to the motel or by reimbursement to petitioner. Father and child arrived and registered the evening of July 12, 1965.

Petitioner returned to the motel on July 13, 1965 after checkout time because of Committee delay in taking his testimony. The motel demanded two nights rental. Petitioner offered to pay for one night unless the Committee approved two or the room remained vacant. (This was improbable as the lobby was filled with people looking for and without a place to stay because of the convention).

The motel refused both offer and tender of one day. Not having exact change, Brunwasser left but

promised to mail a check for one or two days depending on Committee authorization and/or whether the room was rented.

Petitioner was then arrested without warrant for defrauding an innkeeper and with the specific intent to shake him down for the extra day. When he refused to be coerced, the police added a charge of driving his Hertz rental car without an owner's card. (Hertz intentionally refuses to place the indicia of ownership in its District of Columbia motor vehicles).

On July 15, 1965, he and his daughter filed suit in the United States District Court at Alexandria, Virginia (the Court) charging police and motel with false arrest, abuse of process and civil rights violation. Brunwasser defended himself in the criminal case and prepared the civil situation up to trial at which point he retained Attorney Mark P. Friedlander, Jr. (Friedlander) to try it.

On November 22, 1966, at the end of a two day trial, the jury awarded him $3,500 and his daughter, who did not appear, $100.

The judgment was satisfied December 7, 1966 after the two involved insurance companies paid the verdict and costs with four checks to the order of petitioner and Friedlander.

The innkeeper case, then awaiting a de novo trial in the Circuit Court at Arlington, was nonprossed by the Commonwealth attorney. The motor vehicle prosecution had previously been dismissed by that Court in spite of Commonwealth objection.

A dispute then arose between Brunwasser and Friedlander as to proper division of the checks. Neither party would sign unless the issue was resolved. The insurance companies petitioned for and received Court approval to pay the money into the Court registry under alleged authority of Federal Rule of Civil Procedure 67 (p. 5).

On July 17, 1967, Friedlander filed a motion requesting $1,000 "agreed" counsel fees be awarded out of the money held by the Court. Notice served on Brunwasser advised that the motion would be filed at an undesignated time and an order for the $1,000 "agreed" fee presented to the Court for signature on August 25, 1967.

Brunwasser appeared on that date to ask the Court not to sign the order. He objected because settlement and discontinuance of the damage suit plus satisfaction of the judgment had terminated that tribunal's jurisdiction to consider or adjudicate the fee issue. (Brunwasser lives in Pennsylvania and the checks which were there were drawn on Minnesota and New Jersey banks.)

His attempt to ask for a jury trial was met with Court direction to "file a petition" (T. 8).

The Court put off setting a hearing until the next pretrial which had been scheduled on June 9, 1967 for October 20, 1967.

On October 19, 1967, Brunwasser filed a motion de bene esse raising many issues including jurisdiction and jury trial. On October 20, 1967, hearing on all issues was set for November 10, 1967.

At the November 10, 1967 hearing, and before testimony began, Brunwasser called the Court's attention to his motion, incorporated it into the record, asked the Court judicially acknowledge it and asked "the proceedings be dismissed for the grounds set forth in the motion" (T. 3). This was denied (T. 3, 24).

Friedlander's motion for an "agreed" fee was rejected (T. 13). Although he had specifically based his request on an agreed fee and not quantum meruit (T. 2-3), the Court then awarded him $800 on the latter theory without evidence (T. 18-19, 24) and for all practical purposes closed the case (T. 19, 21) while observing that he had not only made up his mind previously but had also attempted to advise Brunwasser beforehand that resistance would be futile (T. 23, 19). The Court filed no Federal Rule of Civil Procedure 58 mandated opinion or finding.

The Fourth Circuit affirmed. It did not discuss the jurisdiction issue. It held Brunwasser had waived his right to jury trial by failure to ask for it on August 25, 1967 even though the record shows he attempted to do this but was blocked by the Court's Order to petition for it (T. 7-8).

Although no appeal had ever been taken from the November 22, 1966 jury verdict and even though the record of what had occurred there or in the criminal proceedings at Arlington were not before it, the appeal opinion decided the verdict was excessive, the motel right and Brunwasser wrong, that he was guilty of crime but escaped only because the motel got tired prosecuting him, that his "life is a battle" and gen-

erally reprimanded him for the entire episode including the appeal and all without evidence, argument or notice and in spite of an actual filed record in the lower court to the contrary notwithstanding.

A petition for rehearing was denied, the entire Bench of the Fourth Circuit holding that the request for jury trial was not sufficient even though *Simmler v. Conner,* 372 U.S. 221 was actually cited to the District Court (A. 36).

This Petition for Certiorari then followed.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Petitioner claims the Federal Court of first instance had no jurisdiction because the damage case which had pended before it was settled and discontinued and the judgment satisfied. The insurance companies and Friedlander rely on Federal Rule of Civil Procedure 67 which states:

> "In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of Court, may deposit with the Court all or any part of such sum or thing. * * *"

REASONS FOR GRANTING THE WRIT

1. Petitioner has been deprived of his Seventh Amendment right to a jury trial by a procedural technicality against which he could not protect himself and which was created after the case was over and imposed retroactively.

Friedlander notified Brunwasser he would ask the Court to sign an Order awarding $1,000 "agreed" counsel fees from a fund then deposited in its registry. He was to present the motion and order on August 25, 1967 at 10 a.m. When the motion was to be filed was not specified. It would be "prior to that time."

If filing the Motion started the 10 day jury trial limitation of Rule 38(b), Brunwasser would have been required to phone the clerk each day to request if this had been done:

The Court of Appeals did not require this burdensome procedure. It held the August 25, 1967 "partial hearing" to be the cut-off date.

> "It is clear that there was notice given that the Friedlander motion would be heard on August 25 and on that day a partial hearing was conducted. At that hearing, Brunwasser made no claim or mention of the right to jury trial. Plainly, we think, he should have notified the Court that he demanded jury trial prior to participating

in a hearing conducted well over a month after the filing and service of the motion. Instead, he first intimated his wish for jury trial more than 90 days after service of the motion. On these facts, we hold that his demand was not timely."

Not only was August 25, 1967 not a time set for partial hearing, but Brunwasser attempted to and was given permission then and there to file a petition containing everything he had to say and wanted.

Under the Alexandria Rules, August 25, 1967 was not a hearing date. This rule set October 20, 1967 as an established pretrial time when the filed Motion would be assigned a trial date (p. 6).

The District Court had not set August 25, 1967 as a time for hearing. Friedlander attempted to obtain an earlier date by presenting the petition in open Court. If Brunwasser had not appeared, the order would have been signed as unopposed.

The Court refused to consider the matter out of term.

"When did I have it set today for?" (T. 2).

"We will hear that at a later date." (T. 6).

"I've got other matters on the docket today." (T. 6).

"I will set a date at the next pretrial." (T. 7).

"I don't want to hear it this morning." (T. 7).

The motion had no return date. However, Brunwasser filed his petition before the pretrial at which

the November 10, 1967 hearing date was set. Neither the Court nor Friedlander claimed this out-of-time or improper. It is respectfully suggested that the return date was November 20, 1967. Request for trial by jury contained in the petition (paragraphs 24, 29, Wherefore clause subparagraph d) was thus timely and in accord with the local rules.

It was apparent on August 25, 1967 that the District Court had both lost patience with Brunwasser and made up its mind (T. 3-8). Petitioner makes this observation in the notice attached to his petition.

> "Although I respectfully believe that Your Honor's observation recorded in the testimony of August 25, 1967 would justify a disqualification Petition under 28 U.S.C. 144, . . ."

The petition challenged the Court's jurisdiction (paragraphs 22, 23) requested a change of venue (paragraphs 34, 35) demanded a jury trial (paragraphs 24, 29) and even considered mandamus as a method for obtaining relief (paragraph 30).

At the August 25, 1967 proceeding, it is apparent the Court restricted Brunwasser's attempt to talk.

> "The Court: That is an absurd argument on your part, and I won't even listen to it.
>
> Mr. Brunwasser: I have the authorities for it.
>
> The Court: I can't be bothered about the authorities, if you have them . . . is too absurd for this Court to listen to.

Mr. Brunwasser: May I respond respectfully?

The Court: No, you may not. You can note an appeal from that statement if you want to." (T. 3).

"Mr. Brunwasser: May I cite authorities from the Supreme Court, Your Honor.

The Court: No, you may not." (T. 5).

Brunwasser raised the jury issue as best he could under the circumstances.

"Mr. Brunwasser: Also, Your Honor . . .

The Court: I don't know.

Mr. Brunwasser: . . . under Simon v. Conner, 332 U.S. 221 . . .

The Court: I said, file a Petition and I will consider it. I didn't say what I would do under it. I don't want to hear it this morning." (T. 7).

To continue talking when the Court said stop would not only be bad public relations, but dangerous. *Douglas v. Ala.,* 380 U.S. 415, 422, 85 S. Ct. 1074, 1079 (1965).

Simon v. Conner was really *Simmler v. Conner* but mistranscribed by the court reporter. This is brought to the attention of the Court of Appeals on page 21 of appellant's brief and in the petition for reargument in paragraphs 7-8. The September 26, 1968 order (A. 37) denying reargument recognized that *Simmler v. Conner,* 372 U.S. 221 was cited but said: ". . . without explanation, and in the context

of the colloquy with the district judge is insufficient to notify the district judge of demand for jury trial."

It is respectfully suggested that in a case where formal Federal Rule of Civil Procedure pleading was nonexistent, Brunwasser did the best he could and did sufficiently apprise the District Court that he desired a jury trial at the August 25, 1967 proceeding.

It appears that the right to jury trial on a disputed issue of fact is absolute if properly raised.

> *Simmler v. Conner,* 1963, 372 U.S. 221, 222 (client sues for declaratory judgment to fix legal fees; his attorney counterclaims to enforce 50 percent contingent contract; client asks contract be cancelled for fraud and overreaching. Held: Jury trial as matter of federal law awarded on all issues);
>
> *Wright v. Ellison,* 1 Wall 16, 68 U.S. 555, 557 (jury trial awarded to set fee on quantum meruit in absence f agreement);
>
> *Beacon Theaters, Inc. v. Westover,* 1958, 359 U.S. 500, 508 (right to jury trial in antitrust treble damage case cannot be circumvented by use of Federal Rules of Civil Procedure 48(b) and 57).

On page 4 (A. 33-34) of its opinion, the Fourth Circuit Court of Appeals erroneously finds: "The trial on November 10th began before the district judge without any mention of the recently filed motion for a jury trial and without any protest that the judge was undertaking to proceed without a jury.[5]" Foot-

note 5 observes, "Late in the hearing, on page 26 of a 29 page transcript, and *after* the judge had announced his decision, Brunwasser renewed his motion for a jury trial."

It is respectfully submitted that the exact contrary is true. Before any testimony had been taken, Brunwasser made the following motion:

> "Mr. Brunwasser: Before we start, Your Honor, I have before Your Honor a Motion that was filed in this Court, October 18, 1967. I incorporate it into the record and ask Your Honor to take judicial notice. I ask the proceedings be dismissed for the grounds set forth in the Motion.
>
> The Court: That is the Motion that this Court doesn't have jurisdiction.
>
> Mr. Brunwasser: And, Your Honor, no venue also . . .
>
> The Court: Well, I read your Motion. I considered it, and it is denied." (T. 3).

The discussion at T. 26 and the mention of a jury trial is not a request for a jury trial but only suggesting to the Court that a writ of prohibition in the Fourth Circuit might be a proper way to enforce this demand.

> "Mr. Brunwasser: I have filed a Motion under (T. 26) Rule 30(a)(b) for a jury trial, cited to Your Honor authority in the U. S. Supreme Court. In addition to noting an appeal, I also bring a Petition for prohibition in the Fourth Circuit as to Your Honor entertaining this case.

The Court: You say you have brought it?

Mr. Brunwasser: No. I will, Your Honor. I want to be fair with Your Honor because Your Honor has always been courteous to me."

The reporter left out the word "intend to" between the words "also" and "bring". Petitioner was only apprising the Court that as an alternative to appeal he might request prohibition. This was not a tardy request for jury trial but an observation on an entirely different procedural matter.

The entire matter of the jury trial is again raised in the petition for rehearing in paragraphs 5-13, 15 and 16.

Petitioner respectfully suggests that he has done everything he could to obtain a jury trial and that it should be awarded him now in the United States Supreme Court by the granting of this writ. It is suggested that this right has been taken from petitioner by a procedural booby trap condemned in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373, 86 S. Ct. 845, 851.

2. Before the insurance companies presented their motions to pay the money into Court, the case had been settled and discontinued, the judgment satisfied and the checks plus Brunwasser home in Pittsburgh. Everyone admits this to be true. Petitioner objected to the use of Rule 67 because nothing was pending before the Court which would authorize it to adjudicate the dispute over fees.

Even if this be considered a 28 U.S.C. 1335 interpleader proceeding[1] and Alexandria a proper juris-

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[1] §1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

diction (see *State Farm Fire & Casualty Co. v. Tashire,* 1967, 87 S. Ct. 1199, 386 U.S. 523), the summary procedure here used was unauthorized. *New Hampshire Fire Insurance Co. v. Scanlon,* 1959, 360 U.S. 404 (summary procedure not authorized by statute frowned upon; plenary proceedings processed according to Federal Rules encouraged.)

If plenary procedure had been used, Brunwasser would have been able to raise his objections and jury trial request in an orderly and free from doubt manner.

The case at Alexandria was over; no jurisdiction remained to entertain the fee dispute.

Without opinion comment, the Fourth Circuit approved the District Court's action and thus went contrary to its own previous decisions plus the rulings of the United States Supreme Court and other Courts both of original jurisdiction and appeal.

Bray v. Staples, 4 Cir., 1910, 180 F. 321, 327 (see dissenting opinion at p. 327);

Wayman v. Southard, 23 U.S. 1, 23, 10 Wheaton 1 (1825);

St. Pierre v. U. S., 319 U.S. 41, 43, 1943 (defendant jailed for contempt; sentence served when case ready for argument; dismissed as moot);

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931.

Cohn v. U. S., 1958, 259 F. 2d 371, 376, 6 Cir. (jurisdiction continues "until final disposition of the cause");

Walling v. Shenandoah-Dives Mining Co., 1943, 10 Cir., 134 F. 2d 395, 396-397 (employer complies with Fair Labor Standard Act order, injunction against future violations refused because case moot and not controversy required for jurisdiction under Article 3, Section 2 of the Federal Constitution);

Macklin et al. v. Kaiser Co., Inc., 1946 (DC Ore.), 69 Fed. Supp. 137, 141 ("It is hornbook law that whenever a case in a Federal Court is settled by agreement, no 'case or controversy' remains and therefore the Court loses jurisdiction.");

In re Volland, 1936, 7 Cir., 83 F. 2d 680 (bankruptcy proceeding closed and debtor discharged; Federal Court has no jurisdiction to enter suit which now must be filed in the State Court);

Dichey v. Turner, 1931, 6 Cir., 49 F. 2d 998, 1000-1001 ("it had control of all the proceedings and processes in that case, not only up to and including recovery of the judgment therein, but until its complete satisfaction").

"The burden of showing by the admitted facts that the Federal Court has jurisdiction rests upon the complainants."

Gibbs et al. v. Buck, 307 U.S. 66, 72.

It is respectfully submitted that neither the Court nor Friedlander has sustained this obligation.

Brunwasser's motion (paragraph 23) rightly observes:

> "That the Court has no jurisdiction generally of the claim and the service is not authorized by any Act of Congress or Rule of Procedure. 28 U.S.C. 1391(b); 28 U.S.C. 1331(a); Rule of Civil Procedure 4(f); Bors v. Preston, 110 U.S. 252, 255 (1893)."

The few cases defining the scope of Rule 67 prohibit its use as a device to pay what is claimed and still fight whether it is payable.

> *General Pencil Co. v. Kahn, Inc.* (S.D. N.Y.), 1965, 246 Fed. Supp. 60;
>
> *Dinkins v. General Aniline and Film Corp.* (S.D. N.Y.), 1963, 214 Fed. Supp. 281, 283.

If the insurance companies actually and in good faith desired to rid themselves of the problem, they could have paid the money into Court in the State case pending in the Court of Common Pleas of Allegheny County, Pennsylvania at No. 2321 April Term, 1967 or brought interpleader in the United States District Court for the Western District of Pennsylvania. (See paragraphs 17 and 18 of October 19, 1967 Petition.)

3. No reason existed for the Fourth Circuit to reevaluate everything that occurred from the time petitioner and his daughter checked into the motel until the rendering of its July 16, 1968 decision. In fact, at oral argument, the Circuit panel declared that this was irrelevant. The matter has been published in the official reports. Readers who do not know petitioner certainly will not form a favorable opinion of him. Naturally, the local Bar will circulate the opinion as a matter of amusement.

This problem was raised in Paragraphs 25-56 of the petition for a rehearing.

The most damaging comment is the statement of Circuit Judge Craven that:

> "Brunwasser was convicted in the lower state court and promptly appealed to a higher state court. At that point the motel decided to give it up as a bad job and further prosecution was discontinued."

Not only does the appeal of Brunwasser wipe out the conviction, but mentioning it in a subsequent trial is reversible error.

> *Baylor v. Com.*, 190 Va. 116, 119;
>
> *Lang v. Com.*, 203 Va. 682, 127 Se. 2d 142, 143.

The motel never gave the case up at that time as a bad job but only discontinued it when the prosecutor observed the action of the jury at Alexandria.

This is brought to the attention of the Court en banc in the petition for rehearing and, in particular, at paragraphs 40-41.

It is respectfully suggested that this type of opinion filed without any notice and condemning the entire conduct of Petitioner, a member of the Bar, from beginning to end would violate *Fountain v. Filson et ux.,* 336 U.S. 681 and *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1962).

It is also respectfully suggested that the Fourth Circuit opinion is merely a sanction taken against your petitioner to punish him for opposing the oppressive conduct of the motel operators plus appealing the fee case to the Fourth Circuit.

Holt v. Va., 381 U.S. 131, 136, 138;

U. S. v. Ewell et al., 383 U.S. 116, see concurring opinion of Mr. Justice Brennan at 126;

Lambert v. Cal., 355 U.S. 25, 228, 229 (1957).

CONCLUSION

The amount involved is not the important aspect of this case. Petitioner has been unable to find any appellate or United States Supreme Court authorities dealing with the manner of proceeding under Rule 67 and the method by which a jury trial should be requested.

It is respectfully suggested that resolving this problem now will advise the bench and bar of the country as to the application of this rule, the procedure thereunder and the method by which a jury trial can be requested or waived.

Additionally, no in point authority has been found in the United States Supreme Court reports concerning the jurisdiction of a Court after a case has been settled and discontinued. The Fourth Circuit does not even discuss the issue in its opinion. Certainly, to resolve this now would expedite efficient judicial procedure.

Lastly, it is suggested that this device of criticizing and ridiculing counsel who has a high standing in his own Court should be discouraged. The only issue before the Court of Appeals was the jurisdiction of the District Court to entertain the case, whether or not a jury trial should be granted and whether or not the procedure was proper.

Nothing was before the Court of Appeals concerning whether petitioner was correct or incorrect,

whether he was guilty or not guilty and his general background and/or disposition to litigate.

If this issue was to be decided, it should have been presented in the lower court or at least in some proper procedural manner in the Court of Appeals.

Petitioner suggests that this technique can be avoided in the future by granting the writ of certiorari.

It is respectfully submitted that the writ of certiorari should be granted and the judgment of the Fourth Circuit Court of Appeals reversed.

Respectfully submitted,
ALLEN N. BRUNWASSER,
Petitioner.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 3743

Allen N. Brunwasser et al.,

Plaintiff

v.

Albert F. Suave et al.,

Defendants

ORDER

This day came Mark P. Friedlander, Jr. in person and by counsel upon his motion for payment of counsel fees out of funds heretofore placed in the registry of this Court, and came Allen N. Brunwasser in person opposing said motion, and the Court heard the matter upon its merits and upon evidence presented in open court and,

It appearing to the court that $800.00 is a fair and reasonable fee for services rendered in this case only, this Court doth

Order judgment be entered in favor of Mark P. Friedlander, Jr. and against Allen N. Brunwasser in the sum of $800.00 with interest from this date, and directs the Clerk of this Court to pay that sum to Mark P. Friedlander, Jr., thereafter disbursing the balance to Allen N. Brunwasser, and

It further appearing to the court that Allen N. Brunwasser has, in open court given notice of his intention to appeal to the 4th Circuit, execution of this Order is suspended pending perfection of said appeal.

Oren R. Lewis,
U. S. District Judge.

Nov. 10/67

We Ask For This:

Friedlander & Friedlander
By Mark P. Friedlander

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 12,066

Allen N. Brunwasser, in His Own Right and Ina Brunwasser, a Minor, etc.,

Appellants

versus

Albert F. Suave, D. R. Hale, Richard Morris, Harry Harding and Arthur R. Pomponio, Individually and t/a King Arthur's Court,

Appellees

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria.
Oren R. Lewis, District Judge.

(Argued May 10, 1968 Decided July 16, 1968)

Before Sobeloff, Winter and Craven, Circuit Judges

Allen N. Brunwasser, Appellant, Pro Se, and Harry P. Friedlander (Marshall H. Brooks on brief) for Appellee Mark P. Friedlander, Jr.

OPINION

Craven, *Circuit Judge:*

To Lawyer—Appellant Allen N. Brunwasser of Pittsburgh, Pa., life is a battle. His latest skirmish with which we are concerned is merely a sequel to his knock-out victory over King Arthur's Court Motel in Arlington, Virginia. It all began on July 13, 1965, when King Arthur's Court, unfortunately as it turned out, rented a room to Brunwasser. After spending the night and transacting his Washington business the next day, Brunwasser returned to the motel some three to five hours after the posted check-out time, vacated his room and offered to pay one night's lodging. When the desk clerk protested the late departure, battle was joined. After some unpleasant words, Brunwasser departed the premises without paying the first night's lodging, not to mention any premium for staying over. Somewhat foolishly as it turned out, but not unreasonably as it seemed at the time, the desk clerk caused Brunwasser to be stopped by Arlington police officers as he proceeded along Lee Boulevard. He was put under technical arrest, detained ten minutes, and then allowed to proceed on his return to Pittsburgh. Charged with defrauding an innkeeper, Brunwasser was convicted in the lower state court and promptly appealed to a higher state court. At that point the motel decided to give it up as a bad job and further prosecution was discontinued. We are advised in oral argument that under Virginia law and procedure the effect was exactly the same as one of acquittal. The foreseeable result occurred. Brun-

wasser sued the owners of the motel and the Arlington policemen in the United States District Court for false arrest. He employed a skilled attorney, Mark P. Friedlander, Jr., who prosecuted his civil action with remarkable success, obtaining a jury verdict against the motel and the policemen in the sum of $3,500.[1] Although the verdict seems to us excessive in view of the circumstances and the limited period of detention,[2] the district judge entered judgment upon it, and no appeal was taken. Liability carriers for the motel and the policemen then issued checks for the total amounts of the judgments in the customary manner, *i.e.*, payable to Brunwasser and his counsel of record, Mark P. Friedlander, Jr. Thus the stage was set for the second vendetta.

After the lapse of many months, it became apparent to counsel for the losing defendants that the checks would not be cashed due to a dispute between Brunwasser and his attorney as to what fee, if any, counsel might be entitled to have. The motel and the policemen[3] moved the court for premission to pay the $3,600 into the registry of the court in complete discharge of the obligation of the policemen and the motel under the prior judgments, and the motions were allowed. Thereafter, on July 14, 1967, Mark P. Friedlander, Jr. moved the court to enter an order allowing him the sum of $1,000 from the funds held

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[1] There was a companion suit filed in the name of Brunwasser's minor daughter who was with him at the motel. The jury returned a verdict for her in the amount of $100.

[2] Compensation works out to a rate of about $360 per minute.

[3] The real movants were the liability insurance carriers.

in the registry of the court for services rendered as attorney in the suit against the motel and the policemen[4] and notified Brunwasser that he would bring the motion on for hearing and determination on August 25, 1967, at 10 a.m.

On August 25, 1967, Brunwasser and Friedlander appeared before the United States District Judge. Brunwasser took the position before the court that it had no jurisdiction to permit the money to be paid into court and, secondly, that Friedlander had waived any right at all to a fee "by his arbitrary and coercive conduct" in refusing to endorse the checks without being assured that he would receive a portion of the proceeds. After a brief hearing the court overruled the objection to its jurisdiction and notified the parties that he would set a time for a hearing on the merits and would hear witnesses as to what is a fair and equitable fee on a later date. The matter was set down for hearing on October 20, 1967, but was apparently continued for the convenience of Brunwasser and was heard on November 10, 1967. On October 19, 1967, Brunwasser filed a "notice" which amounts to an answer to the motion of Friedlander. Attached to the so-called "notice" was a nine-page "motion" again contesting the jurisdiction of the court and for the first time demanding trial by jury.

The trial on November 10th began before the district judge without any mention of the recently filed motion for jury trial and without any protest that

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[4] The amount sought also included compensation for services in the antecedent criminal case.

the judge was undertaking to proceed without a jury.[5] After hearing the testimony of Friedlander, the district judge concluded that Friedlander had failed to establish a contract that he have $1,000 as a fee, and proceeded informally to determine facts and make conclusions of law on a quantum meruit basis. The court entered judgment that Friedlander have and recover from the $3,600 fund deposited in the court the sum of $800 as compensation for his services as attorney in producing the fund.

From this judgment Brunwasser has appealed assigning numerous errors. The merits need not detain us. Obviously Friedlander is entitled to reasonable compensation for his services and it is equally obvious that the district judge bent over backwards to be fair to Brunwasser. Indeed, we think that $800 out of the $3,600 recovery is a bare minimum fee. The size of the verdict is germane to the amount of the fee in two aspects: It is the best evidence of Friedlander's skill, and we think it remarkable that he was able to talk a Virginia jury into such a substantial award. Secondly, results obtained are always pertinent to the reasonableness of a lawyer's fee and especially so in a tort case with an element of contingency.

Turning to the law, which is what appellant Brunwasser craves, we think that only two of his contentions merit brief discussion.

Friedlander's motion that he be allowed a fee from the fund paid into the registry of the court was filed

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[5] Late in the hearing, on page 26 of a 29 page transcript, and *after* the judge had announced his decision, Brunwasser renewed his motion for jury trial.

on July 17, 1967, and properly served on or about that date on Brunwasser. No response appears in the file of the court until October 19, 1967, more than 90 days thereafter. Rule 38 is explicit in its requirement that demand for trial by jury be in writing and served upon the other party "not later than ten days after the service of the last pleading directed to such issue." The Federal Rules of Civil Procedure do not require that there be a written "pleading" in response to Friedlander's motion. United States v. Okawa, 26 F.R.D. 384 (D. Hawaii 1961), 1A Barron & Holtzoff, Federal Practice & Procedure §244. Indeed, where such a document is filed, it is not regarded as a "pleading." Wholesale Supply Co. v. South Chester Tube Co., 20 F.R.D. 310, 315 (E.D. Pa. 1957). Although we are inclined to think that Friedlander's motion was, on the facts of this case, "the last pleading directed to such issue" and that service of his motion started the running of the ten-day period for timely demand, we are reluctant to rest our decision upon such a rigid application of a period of limitation. Nor is it necessary that we do so. It is clear that there was notice given that the Friedlander motion would be heard on August 25 and on that day a partial hearing was conducted. At that hearing, Brunwasser made no claim or mention of the right to jury trial. Plainly, we think, he should have notified the court that he demanded jury trial prior to participating in a hearing conducted well over a month after the filing and service of the motion. Instead, he first intimated his wish for jury trial more than 90 days after service of the motion. On these facts we hold that his demand was not timely. Having decided that Brunwasser failed

to make timely demand for jury trial, we need not decide whether the issue raised by the motion was one triable of right by jury. See Maddox v. Jinkens, 88 F. 2d 744, cert. denied, 301 U.S. 699 (1937); compare Simler v. Conner, 372 U.S. 221 (1963), and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

Brunwasser urges that the trial judge terminated the hearing on November 10, 1967, without permitting defense or counterclaim. We do not so read the record. The alleged counterclaim related to some $336.50 said by Brunwasser to be due him for legal services rendered in Pittsburgh apparently for a client of Friedlander. All that is said about the alleged counterclaim in Brunwasser's pleading filed October 19, 1967, is that Brunwasser was entitled to a fee in the amount of $336.50 for processing a claim in bankruptcy in the United States District Court for the Western District of Pennsylvania for a company called "Eastern Aquatics, Inc." which matter was forwarded by Friedlander to Brunwasser, and that Brunwasser "looked to Mark P. Friedlander, Jr. for payment of his legal fee because he had no personal knowledge or previous association with Eastern Aquatics, Inc." Plainly such a pleading fails to state any legal obligation on the part of Friedlander to pay the fee. We do not hold, however, that the defective pleading is itself justification for refusing to allow Brunwasser to prove his counterclaim. For the record is plain that there was no motion to amend the pleading nor any offer of proof in support of the counterclaim. At no time during the hearing on November 10, 1967, did Brunwasser request the court to be permitted to take the

witness stand to offer testimony on any subject either in opposition to the claim of Friedlander or in support of the alleged counterclaim.

The other assignments of error have been considered and are found to be entirely without merit.

Affirmed.

ORDER

Allen N. Brunwasser has petitioned the panel for rehearing and has also sought a rehearing en banc and has requested the court to delete from the opinion references to the petitioner said to be derogatory and has requested that the court correct what are said to be factual errors contained in the opinion. We have carefully considered the 56 numbered paragraphs of his petition and find none of them worthy of discussion except his renewed argument, previously considered, that he sufficiently demanded trial by jury. We think that the mere citation of Simler v. Conner, 372 U.S. 221, without explanation, and in the context of the colloquy with the district judge is insufficient to notify the district judge of demand for jury trial. Rule 38(b) makes clear how a jury trial should be demanded, and Rule 38(d) provides that the failure to comply with the rule constitutes a waiver of trial by jury. There has been no demand for jury trial in compliance with Rule 38.

The petition for rehearing and for rehearing en banc is denied.

This 26th day of September, 1968.

Clarence F. Haynsworth
E. Sobeloff
Herbert I. Boreman
Harrin L. Winter
J. Braxton Cravin, Jr.
John D. Butzner, Jr.